

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

The Merriman CCRC, Inc.

Employer

and

Case No. 8-RC-16839

**District 1199, The Healthcare and Social Service Union,
WV, KY, OH, SEIU, CTW**

Petitioner

DECISION AND ORDER

Upon a petition filed under Section 9(c) of the National Labor Relations Act (the Act), as amended, a hearing was held before a hearing officer of the National Labor Relations Board, (the Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.¹

I. Issues

The issues in this case are as follows:

A. Whether the Licensed Practical Nurses² are statutory supervisors under the Act.

B. Whether, in the absence of supervisory status, a unit solely comprised of the Licensed Practical Nurses is an appropriate unit for the purpose of collective bargaining.

The Petitioner submits that the Licensed Practical Nurses solely comprise a unit appropriate for collective bargaining. The Employer contends that the Licensed Practical Nurses are statutory supervisors under the Act. In the alternative, the Employer contends that the Licensed Practical Nurses share a community of interest with other service and

¹The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction. The Petitioner is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer. A question affecting commerce exists concerning representation of certain employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. The Employer filed a post-hearing brief which I have carefully considered.

² The Licensed Practical Nurses (LPNs) employed at the Employer's facility are routinely referred to throughout the record as "Team Nurses."

maintenance employees, thus rendering a unit comprised solely of Licensed Practical Nurses inappropriate for the purpose of collective bargaining.

II. Decision Summary

For the reasons set forth below, I find that the Licensed Practical Nurses are statutory supervisors under the Act. Accordingly, I find that the Licensed Practical Nurses do not constitute an appropriate bargaining unit and I shall order that this petition be dismissed.

III. Background

The Merriman CCRC, Inc., is an Ohio corporation located at 209 Merriman Road, Akron, Ohio, 44303, the sole facility involved, where it operates a long-term care and assisted living facility.³

The Nursing Department has approximately sixty-five to seventy employees. Kevin McMahon is the Administrator of the facility. Carol Chieda is the Director of Nursing. Brenda Johnson is the Assistant Director of Nursing. Approximately four full time Charge Nurses⁴ are employed at the facility, as well as approximately fourteen Licensed Practical Nurses, commonly referred to as “LPNs” or “team nurses” and forty-five to fifty State Tested Nurse Aides, commonly referred to as “STNAs.” Each LPN or team nurse has approximately two to three STNAs reporting to them. All of the Charge Nurses, LPNs and STNAs are paid on an hourly basis, have generally the same insurance and benefits available to them and are subject to the same or similar dress code.

IV. Facts

Licensed Practical Nurses / Team Nurses

LPNs have considerable patient contact and work closely with the STNAs. The STNAs are primarily responsible for ninety percent of the hands-on care of patients, including bathing, grooming, toileting and assisting with patient meals. The LPNs direct and oversee the team of STNAs assigned to them for the day, according to the assignments handed down by the Charge Nurses. LPNs have the authority to reorganize and prioritize those assignments based upon changed circumstances and patient or resident needs. The discretionary authority exercised by the LPNs to decide which STNA may be reassigned is not normally reviewed by the Charge Nurses or other management personnel. STNAs do not have the authority to direct the work of any other employees.

³ The Parties stipulated that The Merriman CCRC, Inc., the correct legal name of the Employer, is engaged in commerce within the meaning of the Act.

⁴ The Parties stipulated that all four Charge Nurses and an additional four LPN / Team Nurses who regularly substitute for the Charge Nurses are statutory supervisors under the Act and should be excluded from the proposed bargaining unit.

LPNs have the authority to allow employees to leave work early. They may also send home STNAs if they determine the situation warrants such action. Assistant Director of Nursing, Brenda Johnson, testified that the LPNs can exercise this authority independently and without prior approval from the Charge Nurses, Administrator, Director of Nursing or Assistant Director of Nursing.

The record contained no evidence that LPNs have the authority to hire, fire, or grant wage increases. LPNs do, however, have the authority to write-up or effectively recommend discipline for other employees, as well as initiate disciplinary investigations and gather data that is utilized and considered by the Assistant Director of Nursing and the Director of Nursing during an investigation that may lead to additional formal discipline or during the performance evaluation process for an employee. The record reflects that the Assistant Director of Nursing, the Charge Nurses or the LPNs may sign off on written discipline issued to an employee. STNAs do not have the authority to initiate disciplinary investigations, issue discipline, or participate in the evaluation process of other employees.

LPNs earn between \$4.00 and \$5.00 per hour more than STNAs. LPNs have keys that grant them access to areas that the STNAs do not have access to. The record contained minimal testimony regarding educational requirements for the LPN and STNA classifications, other than that LPNs are certified and STNAs are state tested and required to take a certain number of hours of continuing education.

The Petitioner's witness, LPN Joana Burney, testified that she agreed with the testimony presented by Assistant Director of Nursing Brenda Johnson. Burney further testified that LPNs participate in employee evaluations, issue discipline and independently exercise authority in granting employee requests to leave work.

V. Analysis of Supervisory Issues

The Petitioner asserts that the LPNs are not statutory supervisors under the Act. The Employer contends that the Licensed Practical Nurses are statutory supervisors under the Act. For the reasons explained more fully below, I find that the Employer has met its burden that this classification does exercise indicia of supervisory status as defined in Section 2(11) of the Act. Section 2(11) of the Act defines the term "supervisor" as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To qualify as a supervisor it is not necessary that an individual possess all of the powers specified above. Rather, possession of any one of them is sufficient to confer

supervisory status. **Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985)**. The status of a supervisor under the Act is determined by an individual's duties not by his title or job classification. **New Fern Restorium Co., 175 NLRB 871 (1969)**. The burden of proving supervisory status rests on the party asserting that status **NLRB v. Kentucky River Community Care, Inc., 121 S. Ct. 1861 (2001)**. The Board will refrain from construing supervisory status too broadly because the individual found to be a supervisor is denied the protection afforded to employees under the Act. **St. Francis Medical Care-West, 323 NLRB 1046 (1997)**.

In analyzing the supervisory status of the LPNs, I carefully considered the following indicia that the Employer contends the LPNs possess and exercise: direction of work, discipline, and authority to evaluate.

With respect to the issue of whether the LPNs responsibly direct work in a manner that makes them statutory supervisors, I have carefully considered the Supreme Court's decision in ***Kentucky River*, supra**. In ***Kentucky River***, the Court held that the Board may not exclude from the "independent judgment" required in Section 2(11) the professional or technical judgment used in directing less-skilled employees to deliver services. The Court reasoned that such a per se approach is inconsistent with the language of Section 2(11) and with the Court's previous decision in **NLRB v. Health Care and Retirement Corp., 511 U.S. 571 (1994)**. There the Court held that the statute applies no differently to professionals than to other employees.

Although the ***Kentucky River*** Court found the Board's interpretation of "independent judgment" to be inconsistent with the Act, the Court recognized that it is within the Board's discretion to determine what scope or degree of discretion meets the statutory requirement of "independent judgment." ***Id.* at 1867**. The Court stated "many nominally supervisory functions may be performed without the 'exercise of such a degree of ... judgment or discretion ... as would warrant a finding' of supervisory status under the Act." ***Id.*, citing Weyerhaeuser Timber Co., 85 NLRB 1170, 1173 (1949)**. The Court also agreed with the Board that if the Employer limits the degree of independent judgment by, for example, detailed orders, an individual acting under such orders may be found not to be a statutory supervisor. ***Kentucky River* at 1867, citing Chevron Shipping Co., 317 NLRB 379, 381 (1995)**.

The record in the instant case persuades me that LPNs are required to exercise independent judgment when directing STNA work, by determining when to initiate the investigation process that may lead to discipline of an employee and by participating in the performance evaluation process. The record establishes that the Charge Nurses prepare a daily schedule for the STNAs, but that the LPNs may utilize independent judgment to modify that schedule as needed. LPNs also have the authority to reassign employee work based upon need or a change in circumstances that may affect patient or resident care, such as an emergency requiring immediate attention.

The record also clearly identifies instances when LPNs have routinely exercised independent judgment in making a determination to initiate investigations of concerns

brought to their attention by members of the professional staff, or by family members of patients and residents. The record established that when confronted by such circumstances, LPNs may decide to conduct an interview of the individual who brought the issue to their attention. Upon the completion of an investigation report, the LPN may issue progressive discipline, up to and including suspension, to an employee. STNAs, however, do not have the authority to initiate investigations that may result in discipline, or to implement any disciplinary action or plan for another employee.

Finally, the record establishes that LPNs utilize independent judgment in forming the basis for evaluations of employee job performance. Specifically, the Assistant Director of Nursing, Brenda Johnson, testified that she talks to LPNs regarding STNA evaluations because “they are the ones supervising and directing the care” (TR P. 31). STNAs, however, do not have any input in the evaluation process of other employees.

Conclusion

For all these reasons I find that the LPNs are Section 2(11) supervisors. Accordingly, I need not address the issue of whether the LPNs here, had they been found to be employees rather than statutory supervisors, could by themselves comprise a unit appropriate for collective bargaining.

Based on the foregoing, and the record as a whole, I shall order that the petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition be dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board’s Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by August 23, 2006.

Dated at Cleveland, Ohio, this 9th day of August, 2006.

/s/ [Frederick J. Calatrello]

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8